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MISSOURI PACIFIC RAILWAY *v.* HEIDENHEIMER.[1]
SUPREME COURT OF TEXAS.

Stoppage in Transitu—Loss of Right by Assignment of Bill of Lading as Collateral Security.

The assignment of a bill of lading as collateral security for the payment of a loan prevents the consignor from exercising his right of stoppage in transitu until he has discharged the debt secured by such transfer.

THE EFFECT OF A PLEDGE OF A BILL OF LADING UPON THE RIGHT OF STOPPAGE IN TRANSITU.[2]

It is a well-known rule of the law of sales that an unpaid vendor has the right of stopping goods sold and unpaid for after they have left his possession and before they come into the actual or constructive possession of the purchaser, or those standing in his place, in those cases where the purchaser has become insolvent. So firmly established is this right of the unpaid vendor that it can be defeated in but one way, and that is by the assignment of the bill of lading given for the goods to one who *bona fide* gives *value* for *a property* in the goods (Blackburne on Sales, 320). It thus appears that a consideration of the effect of the transfer of a bill of lading upon the right of stoppage in transitu involves a discussion of the property transferred, the consideration and the *bona fides*.

(*a*) *Of the Property Transferred.*—Though the assignment of the bill of lading, in order to divest the vendor's right of stoppage in transitu, must be in furtherance of a contract to give an interest in the goods for a valuable consideration, it is not necessary that it should be a contract to give the whole interest in the goods. It will still effec-

[1] 17 S. W. Rep., 608.

[2] I do not agree with the writer in the conclusion which he reaches that the endorsement of the bill of lading to the pledgee puts an end to the transit and amounts to a delivery. The principles which govern the rights of the vendor and the pledgee have, however, not yet been definitely settled, and the note will be useful in keeping alive the interest of the profession in the subject.—FRANK P. PRICHARD.

tively destroy the right, so far as it was transferred, whether the transfer was to a pledgee or to a technical purchaser for value: Lickbarrow *v.* Mason, 1 Sm. L. C., 763; Kemp *v.* Falk, L. R., 7 App. Cas., 573; Coventry *v.* Gladstone, L. R., 6 Eq., 44; Schumacher *v.* Eby, 24 Pa., 528; Skilling *v.* Bollman, 73 Mo., 665; Mo. Pacific Rwy. *v.* Heidenheimer, 17 S. W. Rep., 608; Shepard *v.* Newhall, 54 Fed. Rep., 306. On account of space limits the present article will be confined to a discussion of the cases deciding the effect of the transfer of the bill of lading by way of pledge upon the right of stoppage in transitu.

A pledge conveys but a special property to the pledgee, while the general property over and above the special property remains in the pledgor. It is, therefore, an important modification of the effect of a pledge of the bill of lading upon the right of stoppage in transitu, that the vendor's right will remain so far as to entitle him to any surplus proceeds after satisfying the rights of the creditor to whom the bill was transferred as a security, as measured by the extent of his advances: *In re* Westzinthus, 3 B. & Ad., 817; Spalding *v.* Ruding, 6 Beav., 376; *Ex parte* Golding Davis, L. R., 15 Ch. D., 728; Chandler *v.* Fulton, 10 Texas, 2; Mo. Pac. Rwy. *v.* Heidenheimer, 17 S. W. Rep., 608. Thus, in a case where one Westzinthus, of Leghorn, shipped oil to his purchaser in London, sending him the bills of lading, and the latter pledged them to his creditor, Hardman, and the vendor, on hearing of the purchaser's insolvency, stopped the goods before their delivery to Hardman, the stoppage was held good over and above the amounts advanced by Hardman: "For since Westzinthus would have a clear right at law to resume the possession of the goods on the insolvency of the vendee had it not been for the transfer of the property and right of possession by the indorsement of the bill of lading for a valuable consideration to Hardman, it appears to us that in a court of equity such transfer would be treated as a pledge or mortgage only, and Westzinthus would be treated as reserving his former interest in such pledge subject to that of the pledgee or mortgagee:" *In re* Westzinthus, 5 B. & Ad., 817.

Now, since a transfer of a bill of lading for value by way of a pledge only transfers a property in the goods represented to the extent of the consideration, and the title to the surplus still remains in the vendee, subject to the right of stoppage, clearly this right of the unpaid vendor covers the whole of the surplus in the vendee's hands, and cannot be defeated beyond the advance by reason of there being other unpaid debts due the pledgee by the vendee. Thus, in the case of Spalding *v.* Ruding, 6 Beav., 376, the pledgee of a bill of lading to goods valued at £1800 for an advance of £1000, was prevented from interposing other debts due him by the insolvent vendee for the purpose of defeating the vendor's right of stoppage in the balance.

The consignor of the goods has against the pledgee in such cases the further equitable right of insisting upon the marshaling of assets: *In re* Westzinthus, 5 B. & Ad., 817; Spalding *v.* Ruding, 6 Beav., 376; Kemp *v.* Falk, 7 App. Cas., 575.

Thus, in the case of *In re* Westzinthus, *supra*, where the pledgee had also other property of the consignee as security, and had sold both that property and the oil covered by the bills of lading, other creditors of the consignee wished to compel Hardman, the pledgee, to take his payment equally out of the two funds, and to be allowed to share *pro rata* with Westzinthus in the total balance. But Lord DENMAN, in his opinion, said: "If then the consignor had an equitable right to the oil subject to the pledgee's lien thereon for his debt, he would by means of his goods have become a surety to the pledgee for the consignee's debt, and would then have a clear equity to oblige the pledgee to have recourse against the consignee's own goods deposited with him to pay his debt in ease of the surety."

(*b*) *Of the Consideration.*—The contract between the parties at the time of the transfer of the bill of lading must be based on a valuable consideration in order to pass a title to the property symbolized and defeat the right of stoppage in transitu. That a consideration advanced at the time of the transfer of the bill of lading is sufficient is universally admitted and needs no other authority than the cases already cited.

But whether a prior indebtedness is such a consideration for the transfer of the bill of lading as will protect the pledgee against the consignor is a much mooted question. Its determination depends upon the view adopted by the courts of the jurisdiction in which the question may arise as to why the transfer of the bill of lading should be allowed to defeat the right of stoppage in transitu in any instance. That is to say, whether they think such result is due to the commercial nature of the security, or to estoppel, or to the effect of the transfer of a bill of lading as a symbolical delivery of the goods.

(1) *From the Commercial Nature of the Bill of Lading.*—Viewing the bill of lading as an instrument of commerce, it is likened by analogy to a negotiable instrument. It is said that its one element of negotiability, in the sense of giving the transferee a better title than the transferror had, consists in the fact that its transfer *bona fide* for value will destroy the right of stoppage in transitu: Anson on Contracts, 230. And it is held, therefore, that the question of valuable consideration in the pledge of a bill of lading for prior indebtedness depends upon the view adopted by the courts of that jurisdiction in the analogous case of the transfer of a promissory note as collateral security for an antecedent indebtedness: St. Paul's Rolling Mills Co. *v.* Great Western Despatch Co., 27 Fed. Rep., 435; Lee *v.* Kimball, 45 Me., 172; Conrad *v.* Fisher, 37 Mo. App., 352.

Thus, in St. Paul's Rolling Mills Co. *v.* G. W. Despatch Co., *supra*, where the consignee had transferred the bill of lading to a bank as security for an antecedent indebtedness before his insolvency, and the unpaid consignor sued the Despatch Co. for delivering the goods to the bank after notice of the stoppage in transitu, NELSON, J., said: "Authorities differ upon this point, as to whether an antecedent debt is a valuable consideration, and some courts hold that such transfer as security for a pre-existing debt is not for a valuable consideration, and does not defeat the right of.

stoppage in transitu, but the United States has announced the rule to be (Railroad *v.* Bank, 102 U. S., 14) that such a transfer is not an improper use of commercial security, and the *bona fide* holder is not affected by equities or defences between prior parties of which there was no notice. True, in Railroad *v.* Bank the transfer was of a promissory note, but the rule extends to all commercial securities, including bills of lading."

And in the similar case of Conrad *v.* Fisher, 37 Mo. App., 432, Judge SEYMOUR D. THOMPSON, after a learned and exhaustive examination of the authorities, declares the question an unsettled one in that State, and in seeking for analogies as aids in determining the question compares and discusses the nature of the consideration required to protect a purchaser from a vendee who obtained the goods by fraudulent representations, or from a transferrer of land seeking to defraud creditors, or from one in whose hands the land is subject to unrecorded equities, and then says: "But the analogy to the transfer of commercial paper is the most direct, though, unfortunately, in great conflict. . . . . But since this case is really governed by the law of Kentucky, which says that the transferee of negotiable paper as collateral security for antecedent indebtedness is not a *bona fide* purchaser for value, that law determines the question."

The reason given by the States which follow the rule as laid down in Kentucky may be said to be that since nothing is surrendered by the transferee upon the receipt of the instrument merely as collateral security for an antecedent indebtedness, he is not deprived of any right or advantage enjoyed at the time of the transfer. He does not take upon himself any additional burdens, nor subject himself to any additional inconveniences, and, therefore, there is no reason why the goods of the consignor should be taken to pay the debts of another.

The basis of the cases taking the contrary view that the consideration is sufficient in such cases, is tersely expressed by Judge REDFIELD in Atkinson *v.* Brooks, 26 Vt., 569, when in the course of his opinion he says: "He certainly does forego the pursuit of his own debt, and thus certainly puts himself in a different and in law in a worse situation, and this must be regarded as *prima facie* a foregoing of some advantage, and also an accommodation to the indorsee, who may fairly be presumed to prefer this mode of meeting his debt. The transaction, therefore, possesses both the cardinal ingredients which constitute the text-book definition of a valuable consideration—it is a detriment to the promisor and an advantage to the promisee—and it is no satisfactory answer to the case to say that the party who takes such bill or note which proves unproductive is in the same position as he was before. This is by no means certain; he has for the time foregone the collection of his debt, and in such matters time is of the essence of the transaction, and the debtor thereby gains time which is often of the most vital consequence to him." In short, it is ordinarily fair to presume that although there may not have been an express agreement to forbear, yet it is necessarily implied from the nature of the transaction and the object which the parties have in view.

Following this analogy the courts

of England (Leask *v.* Scott, 2 Q. B. D., 376); Canada (Clementson *v.* Grand Trunk Railway, 42 U. C. Q. B. 273), and the United States (St. Paul's, etc. Co. *v.* Despatch Co., 27 F. R., 435), and of the States of California (Davis *v.* Russel, 52 Cal., 611), and Illinois (Peters *v.* Elliott, 78 Ill., 321), hold the consideration valuable, while the courts of Alabama (Loeb *v.* Peters, 63 Ala., 243); Maine (Lee *v.* Kimball, 45 Me., 172), and New York (Barnard *v.* Campbell, 58 N. Y., 73), would permit the consignor to stop the goods in transit as against the pledgee for lack of a consideration sufficient to give the latter a better equity. If the other States should follow prior rulings in cases upon negotiable instruments as collateral security for antecedent indebtedness, Connecticut, Delaware, Georgia, Indiana, Louisiana, Maryland, Massachusetts, Missouri, New Jersey, Rhode Island, South Carolina, Texas and Vermont would be added to the former list, and Arkansas, Iowa, New Hampshire, Ohio, Pennsylvania, Tennessee, Virginia and Wisconsin to the latter (Jones on Pledges, 111 and 117, Kintzing's Article, "The Conflict of Laws Upon the Use of Negotiable Instruments as Collateral Security for Antecedent Indebtedness," 30 AMERICAN LAW REGISTER, N. S., 1891.)

(2) *From Estoppel.*—Viewed from the standpoint of estoppel, the transfer of the bill defeats the consignor's right in this way: The consignor has parted with possession of the goods with the intention of passing the title to the consignee, and by sending him the evidence of ownership in the form of a bill of lading has given him the apparent right of disposal. The pledgee acting upon the evidence of title which the owner has permitted the consignee to assume, has been induced to part with value upon the faith of the security thereby indicated. Here evidently one of two innocent persons must suffer by the act of the consignee, and it is but just that he who by his misplaced confidence has enabled the consignee to occasion the loss should suffer for it. The vendor, therefore, is estopped to deny the right of the consignee to pass any title to the pledgee.

To accept the view of estoppel as the reason why the transfer of a bill of lading defeats the right of stoppage in transitu is to destroy the use of a bill of lading as a security for an antecedent indebtedness. For the rule is founded upon the reason for it; *i. e.*, that the consignor should not be allowed to deny the credit with which he has enabled another to obtain value from the pledgee, and since where the debt is already existing there can be no advance made or value given *upon the faith of the document*, the consignor has not been the direct cause of the loss of the pledgee, and he may stop the goods: Barnard *v.* Campbell, 58 N. Y., 575; Holbrook *v.* Vose, 6 Bosw., 76; Lessassier *v.* The Southwestern, 2 Woods C. C., 35; Rodger *v.* Comptoir, L. R., 2 P. C., 395, overruled by Leask *v.* Scott, L. R., 2 Q. B. D., 376.

(3) *From the Effect of the Transfer of a Bill of Lading as a Symbolical Delivery of the Goods.*—The very nature of stoppage in transitu as a right exercisable only between vendor and vendee while the goods are in transit and until they come into the possession of the vendee or some one claiming through him, shows at once that the true cause

of the defeat by the transfer of the bill of lading is due to its effect as a symbolical delivery of the goods. On the delivery of the bill to the pledgee the goods ceased to be in transit between the vendor and vendee, for the carrier was no longer a middleman between them, but an agent for the pledgee to whom the delivery of the bill had acted as a constructive delivery of the goods: Lord BLACKBURNE in Sewell *v.* Burdick, L. R., 10 App. Cas., 74, Art. Sewell *v.* Burdick, 29 Sol. J., 350. True, to have such effect the transfer must be for a valuable consideration so as to have passed the property in the goods, but this no longer depends upon estoppel or the rule in negotiable paper, but upon whether in the abstract a past indebtedness is a good consideration in the purchase of property. Thus in Leask *v.* Scott, 2 Q. B. D., 376, Lord BRAMWELL, in overruling Rodger *v.* Comptoir, *supra*, said: "We cannot agree with Rodger *v.* Comptoir. There is not a trace of such distinction between cases of past and present consideration to be found in the books. It is true there is no decision the other way but wherever the rule is laid down, it is laid down without qualifications, viz., that the transfer of the bill of lading for a valuable consideration to a *bona fide* transferee defeats the right of stoppage in transitu. . . . It is true, no doubt, that opinions must be taken *secundum subjectam materiam*, but it is strange that no judge, no counsel, no writer, ever guarded himself against laying down this rule too widely by mentioning the qualification if he thought it existed. We cannot help but say that not only is the case a novelty, but it is a novelty opposed to what may be called the silent authority of all the previous judges and writers who have dealt with the subject:" Clementson *v.* Rwy., 42 U. C. Q. B., 275.

(*c*) *Of the Good Faith.—Bona fides* on the part of the pledgee is also necessary, but notice of what fact is sufficient to destroy the protection against the exercise of stoppage is more a question of notice than of bills of lading.

Obviously a mere fictitious transfer for the purpose of defeating the right will be of no avail: Rosenthal *v.* Dessan, 11 Hun., 49. Knowledge of the insolvency of the transferor is evidence of a lack of good faith: Vertue *v.* Jewell, 4 Camp., 81; Covell *v.* Hitchcock, 23 Wend., 611; Kitchener *v.* Spear, 30 Vt., 345; Seymour *v.* Newton, 105 Mass., 275.

It is said in Holbrook *v.* Vose, 6 Bosw., 76, that where "the transferee acts upon the faith of the bill of lading, he necessarily knows that the goods are in transit, and that if not paid for they are subject to the vendor's right to stop them if the vendee become insolvent. It would not, therefore, be inequitable to hold that with such knowledge, and knowledge also that the goods have not been paid for, he makes his advances subject to the vendor's right, and does so voluntarily with knowledge of all the facts." But even this was a mere criticism of the general rule which was admitted to be that mere notice that the goods were unpaid for in the absence of notice of facts making the assignment unfair and dishonest, was not sufficient to destroy *bona fides:* Canning *v.* Brown, 9 East, 409; Salomons *v.* Nissen, 2 T. R., 687.

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